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No. 84-320

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

NATIONAL FARMERS UNION INSURANCE COMPANIES; and LODGE GRASS SCHOOL DISTRICT NO. 27,

Petitioners,

v.

CROW TRIBE OF INDIANS; LEROY SAGE, a minor; FLORA NOT AFRAID, his guardian; THE TRIBAL COURT OF THE CROW INDIAN RESERVATION; EDDIE ROUNDFACE, GLEN BIRDINGROUND, and IRA LEFT HAND, Judges of the Tribal Court of the Crow Indian Reservation; CROW INDIAN TRIBAL COUNCIL; and DONALD STUART, Chairman of the Crow Indian Tribal Council,

Respondents.

On Petition For a Writ of Certiorari to The United States Court of Appeals For The Ninth Circuit

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BRIEF OF GLACIER COUNTY, MONTANA AND OF THE EAST GLACIER COUNTY WATER & SEWER DISTRICT AS AMICUS CURIAE IN SUPPORT OF PETITION

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BRIEF OF GLACIER COUNTY, MONTANA AND OF THE EAST GLACIER COUNTY WATER & SEWER DISTRICT AS AMICUS CURIAE IN SUPPORT OF PETITION

Glacier County, Montana, and the East Glacier County Water and Sewer District urge that a writ of certiorari be granted to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on July 3, 1984, in the above cause reported at 736 F. 2d 1320(1984). This brief amicus curiae is being filed pursuant to Rule 36.4, Rules of the Supreme Court.

INTEREST OF THE AMICUS CURIAE

Glacier County is a political subdivision of the State of Montana. The Blackfeet Indian Reservation is located almost entirely within Glacier County and of the approximate 10,600 residents of Glacier County, 6000 reside on the Blackfeet Reservation. Approximately 1500 of such persons are nonIndians. Property ownership includes Indian and nonIndian fee, trust, and Tribal ownership. The County provides a full range of legally-mandated services and programs to both Indian and nonIndian residents of the Reservation.

The East Glacier County Water and Sewer District is a public corporation organized and existing pursuant to Title 7, Chapter 13, Parts 22 & 23 MCA. The District was organized and formed to provide water and sewer services to an area essentially comprising the unincorporated community of East Glacier Park, Glacier County, Montana, and is entirely located within the exterior boundaries of the Blackfeet Indian Reservation. The District serves consumers which consist of nonIndians and members of the Blackfeet Tribe. At the present time the District is indebted to the Farmers Home Administration for loans of $679,000.00 for water and sewer system improvements. The income for the District to pay the principal, interest and reserve accounts for said loans and for its operation and maintenance costs is derived solely from user fees and connection charges which the District is, by law, required to levy and charge to its customers.

As explained below, the decision of the Ninth Circuit in the *National Farmers Union* case will have grave consequences to the operations on Indian reservations of political subdivisions such as Glacier County and of quasi-governmental organizations such as the East Glacier County Water and Sewer District.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

I. SUMMARY OF ARGUMENT

The practical effect of the Court of Appeals' decision in the *National Farmers Union* case is to deny nonIndian persons, businesses, and political entities residing, doing business on or located within Indian reservations, whether by choice or by legal requirement, the right to challenge, in a federal forum, the wrongful imposition of tribal court jurisdiction. The consequences of such decision can hardly be over-emphasized where the assertion of jurisdiction by the Indian tribal court may, as pointed out below, be clearly in excess of the tribe's own constitution and by-laws and where the economic and social consequences of such assertion of jurisdiction are extremely adverse to Indians and nonIndians alike. Without a federal forum in which to challenge tribal court jurisdiction, nonIndian persons, businesses and political subdivisions are without any protection whatsoever from the abuse of that jurisdiction and from the assertion and expansion of jurisdictional claims over them by Indian tribes.

II. ARGUMENT

A concrete example of the operation and effect of the Court of Appeals' decision is evidenced by the present situation involving the Blackfeet Tribe and the East Glacier County Water and Sewer District. The Blackfeet Tribe of the Blackfeet Indian Reservation is formed under the Wheeler Howard Act, 48 Stat. 986 and is incorporated under the laws of the State of Montana. Article VI, Section 1(k) of the Constitution and By-laws for the Blackfeet Tribe of the Blackfeet Indian Reservation, Montana, 1935, provides that:

> The council of the Blackfeet Reservation shall exercise the following powers, subject to any limitations embod-

ied in the statutes or the Constitution of the United States *and subject further to all express restrictions upon such powers contained in this constitution and the attached by-laws . . .*

To promulgate ordinances for the purpose of safeguarding the peace and safety of residents of the Blackfeet Indian Reservation, and to establish minor courts *for the adjudication of claims or disputes arising amongst members of the tribe*, and for the trial and punishment of *members of the tribe* charged with a commission of offenses set forth in such ordinances. (Emphasis supplied).

By virtue of the foregoing provisions in its Constitution and By-laws the jurisdiction of the Blackfeet Tribal Court is specifically limited to the adjudication of claims or disputes arising "amongst members of the tribe". At no place in its Constitution or By-laws has the Blackfeet Tribal Court been given any civil or criminal jurisdiction over nonmembers of the tribe or over claims or disputes involving nonmembers.

In *Quechan Tribe of Indians v. Rowe* 531 F.2d 408 (9th Cir., 1976) the Court of Appeals, in interpreting a clause in the Constitution and By-laws of the Quechan Tribe exactly the same as the above cited provision of the Blackfeet Tribal Constitution and By-laws, held that if the Quechan Tribe ever had the power to try nonmembers for violation of Tribal law, it had foresworn it by virtue of the provision in its Constitution limiting jurisdiction of the Tribe to members only. The Court stated:

It is argued on behalf of the tribe that its tribal court has the inherent authority to assert criminal jurisdiction over nonmembers of the tribe who violate tribal laws while on the reservation. This power is said to be found in general Indian law. We need not refer to

general Indian law to resolve the question in this case, however, because the answer is found in the Quechan Constitution itself. Article IV, Section 7 of that Constitution provides:

"The council shall have the power to promulgate ordinances... and to establish minor courts...for the trial and punishment of members of the tribe charged with a commission of offenses set forth in such ordinances." Consequently the Quechan Tribe, if it had the power to try nonmembers of the tribe for violation of tribal law, has foresworn it.

Notwithstanding its jurisdiction being specifically limited as set forth above, Blackfeet Tribe has and continues to assert civil jurisdiction over nonIndian persons, businesses and political entities within its Reservation boundaries.

The East Glacier County Water and Sewer District is a case in point. The District never has been and is not now a member of the Tribe and is not formed, authorized, licensed or regulated under any law, statute or other authority of the Tribe.

In the spring of 1983 the District notified certain of its consumers, including members of the tribe and nonmembers, of its intention to terminate their water and sewer services by reason of their failure to pay their accounts. On the basis of a complaint verified by a member of the Tribal Council (and one of the same individuals who had been served with a notice of discontinuance) the Blackfeet Tribal Court issued, without notice to the District, a Temporary Restraining Order prohibiting it from discontinuing water and/or sewer service to any member of the Tribe.

The District entered its special appearance in Tribal Court challenging its jurisdiction, citing the Tribal constitu-

tional limitations referred to above and the *Quechan* case. Nevertheless, in November 1983 the Tribal Court ruled that it had jurisdiction over the Plaintiff; that its Temporary Restraining Order would remain in effect; and that pending a trial on the merits the District was enjoined from terminating water or sewer service to any member or nonmember. See *Blackfeet Tribal Business Council v. East Glacier County Water and Sewer District*, 11 Indian Law Reporter 6021, (1983).

Following the entry of the Tribal Court's decision the District filed an action in Federal District Court in Great Falls, Montana, challenging the jurisdiction of the Tribal Court. The District brought its action under 28 USC Section 1331. The Tribe moved to dismiss for lack of jurisdiction. On the basis of *Cardin v. DeLaCruz*, 671 F.2d 363 (9th Cir. 1982) cert. denied, 103 S.Ct. 293 (1982); *Snow v. Quinalt Indian Nation*, 709 F.2d 1319 (9th Cir. 1983); and *Babbitt Ford Inc. v. Navajo Indian Tribe*, 710 F.2d 587 (9th Cir. 1983) cert. denied, 104 S.Ct. 1707 (1984), the court initially concluded that the District had stated a federal claim cognizable under 28 USC Section 1331. It subsequently reversed itself and dismissed the District's Complaint in the wake of the *National Farmers Union* decision. *East Glacier County Water and Sewer District v. The Blackfeet Tribe et al*, Cause No. CV 84-33-GF (D.Mont. Great Falls Division).

As a consequence of the Tribal Court's Restraining Order, the District has been unable to collect sufficient user fees to service its debt obligations to the Farmers Home Administration and to many of its other creditors. At this point in time there is the very real possibility that the District will be unable to continue its business operations with the resulting loss of water and sewer services to the Indian and nonIndian residents of East Glacier Park, Montana, and the default on

substantial loans made to the District by the federal government through the FmHA.

It must be emphasized that political subdivisions such as Glacier County and public corporations such as the East Glacier County Water and Sewer District either locate or do business and provide services on the Indian reservations not so much by choice, as by legal requirement or by reason of the fact that certain necessary services would not otherwise be provided by any governmental entity.

In the case of the East Glacier County Water and Sewer District the previously existing water and sewer systems had been in part privately owned and in part maintained by Glacier County. The improvement of those systems was the end result of an election by the nonIndian and Indian persons in East Glacier Park to better their situation by forming their own State created water and sewer district which now owns and operates the improved water and sewer systems. Despite the District's attempts to seek participation from the Blackfeet Tribe in the water and sewer projects, such assistance was denied by the Tribe.

In the case of Glacier County, Montana, it, by State law, builds and maintains county roads on the Reservation, operates two school districts, operates school bus routes, provides county welfare services, provides law enforcement through the Glacier County Sheriff's office, provides justice of the peace services, provides rural fire protection and provides certain health-related services. Such services are provided to both Indian and nonIndian persons.

By way of example, Glacier County is legally required to enforce Montana's Motor Vehicle Recycling and Disposal laws (Title 75, Chapter 10, Part 5 MCA). On September 6th, 1984, the County, acting for the State Department of Health and Environmental Sciences, obtained a judgment in the

Ninth Judicial District Court in Glacier County, prohibiting a nonIndian from operating an unlicensed motor vehicle wrecking facility on fee patent land owned by another non-Indian in East Glacier Park, Montana. *State of Montana ex rel Department of Health and Environmental Sciences v. Sitzman*, Cause No. DV 84-091.

On September 27, 1984, when the Glacier County Road Department went to take possession of the junk vehicles pursuant to the State Court Order, the Blackfeet Tribal Court, on application of a tribal member claiming to be the lessee of the nonIndian's fee land, issued an injunction prohibiting the County from removing any vehicles, and thereby enforcing the State law and State Court Order against the nonIndian violators of the State Codes. *Blackman v. Glacier County*, Blackfeet Tribal Court Cause No. 84 CA 347.

Glacier County specially appeared and moved to dismiss the Tribal Court action based upon the fact that the County was proceeding against a nonIndian violating Montana State law on fee patent land owned by another nonIndian and based upon the jurisdictional limitations of the Blackfeet Tribal Court discussed above.

At a hearing on October 1st, the Tribal Court ordered both the nonIndian owner of the land and the claimed Indian lessee to comply with State law within 30 days. Nevertheless, the Tribal Court injunction remains in effect and the State has been put in the position of being unable to enforce its laws and court orders against its own nonIndian citizens violating those laws and court orders on nonIndian, fee patent land unless, apparently, the Tribal Court concurs. The Blackfeet Tribal Court, clearly, has no jurisdiction over the County or the subject matter of the lawsuit because of its own constitution and bylaws, but the County has

absolutely no court in which to challenge the Tribe's unlawful assertion of jurisdiction over its operations.

Under the *National Farmers Union* decision (and as the Blackfeet Tribal Court did in the *East Glacier County Water and Sewer District* and *Blackman v. Glacier County* cases), an Indian tribal court can, in violation of its own constitution and by-laws, assert jurisdiction over political subdivisions and quasi-governmental entities of the State, interfere with or bring to a halt the provision of vitally needed services to Indians and nonIndians alike, and be immune from any challenge to the wrongful assertion of such jurisdiction in federal court.

It should also be pointed out that, at least with respect to the Blackfeet Tribe, no person, business entity or political subdivision which is not a member of the Tribe has any participation or vote in its governmental operations or in its elections. In other words, the Tribal Council is elected solely by members of the tribe; and the Tribal Council adopts ordinances and rules, appoints the Tribal judges and funds the operations of the Tribal Court. Consequently, nonmembers of the tribe have absolutely no input or vote into the governmental processes and institutions which can and do directly and adversely influence their economic fortunes or working existence. This notwithstanding that, at least in the case of the political subdivisions, such entities may be doing business on the reservation only by law or public necessity.

The situation is not much better for the nonIndian landowner or businessman on the reservation. He has no voice in the tribal government yet is subject to the wrongful assertion of tribal court jurisdiction. In the wake of the *National Farmers Union* case, he has no forum in which to litigate his grievance or protect himself and his property from an abuse

of jurisdiction by the tribe other than in the very court that caused the problem in the first place.

As can be seen in the examples aforecited, the rule handed down by the Court of Appeals will have a profound, adverse and long term effect on the interaction, both legal and commercial, between persons, businesses and public institutions and entities living and doing business on Indian reservations. Such effects adversely impact both Indians and nonIndians alike.

CONCLUSION

The *National Farmers Union* case presents extremely important questions involving the ability of governmental entities, political subdivisions and quasi-governmental entities to function on Indian reservations and to provide to nonIndian and Indian inhabitants critical services necessary for health, welfare, education and safety.

Accordingly, this Court should grant the Petitioner's request for Writ of Certiorari to review the decision of the Ninth Circuit Court of Appeals in this case.

Respectfully submitted.

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October 26th, 1984